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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
NYNEX Petition for Stay Pending Judicial Review	)	CCB/CPD 97-36

OPPOSITION OF TIME WARNER COMMUNICATIONS HOLDINGS INC.

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COMMUNICATIONS HOLDINGS INC.

August 8, 1997

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Time Warner Communications Holdings Inc. ("TWComm"), by its attorneys, hereby files its Opposition to the Petition for Stay of Section 69.155(c) of the Commission's rules[1] pending judicial review filed by NYNEX Telephone Companies ("NYNEX") in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

As NYNEX states in its Petition for Stay,[2] the Commission applies a four-part test in reviewing petitions for stay pending judicial review. The Commission considers whether the petitioner has demonstrated that (1) it is likely to prevail on the merits on appeal; (2) it will be irreparably harmed absent a stay; (3) a

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1 See 47 C.F.R. 69.155(c) adopted in Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; and End User Common Line Charges, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order (released May 16, 1997) ("Access Charge Order").

2 See Petition for Stay Pending Judicial Review, CC Docket No. 96-262 (July 23, 1997) ("Petition for Stay").

stay would not substantially harm other interested parties; and (4) a stay would serve the public interest.[3]

As demonstrated below, NYNEX has failed to meet any of the four prongs of this test. NYNEX has asked the Commission to stay its rule adopted in the Access Charge Order that the per-minute residual transport interconnection charge ("TIC") may not be applied where a competitive access provider ("CAP") provides switched transport service.[4] In essence, this Petition for Stay represents a plea for protection from competition by NYNEX. The Company openly acknowledges that it has far more non-service related costs in its residual TIC than other ILECs. Rather than attempt to identify the rate elements to which these costs should be applied (something it has had many opportunities to do), NYNEX asks that its competitors continue to pay for those costs through the TIC. The petitioner offers numerous arguments in support of this request, all of which boil down to the simple fact that NYNEX does not want to or is unable to lower its costs to meet competition. In short, as a reviewing court will recognize, NYNEX has failed to provide any support for its assertion that the Commission acted unlawfully in adopting Section 69.155(c) of its rules.

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[3] See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

[4] NYNEX alternatively seeks a "partial stay" of Section 69.155(c) to allow NYNEX to recover its non-service related costs from CAP transport customers. The arguments contained in this Opposition apply equally to both NYNEX's stay and partial stay requests.

In addition, NYNEX has failed to demonstrate that it will suffer irreparable harm in the absence of a stay. Moreover, NYNEX fails in its Petition for Stay to account for the substantial harm a stay would cause its competitors as well as the public interest in general. The Commission should therefore deny the Petition for Stay of Section 69.155(c) of its rules.

II. NYNEX IS NOT LIKELY TO SUCCEED ON THE MERITS OF APPEAL.

NYNEX argues that the Commission's decision to prohibit the application of the per minute residual TIC where a CAP provides competitive transport service was arbitrary and capricious and was adopted without adequate opportunity for notice and comment. On both the substantive and procedural arguments, NYNEX has little chance of prevailing on appeal.

A. The Commission's Adoption Of Section 69.155(c) Was Rational And Supported By The Record.

As the D.C. Circuit has stated, a "court will not disturb the decision of an agency that has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"[5] The D.C. Court of Appeals has recently applied this standard to the Commission's interim transport rate structure rules. In overturning the Commission's decision to implement the TIC as part of the transport rate structure, the D.C. Circuit held that the Commission must either establish a cost-based rate structure or present a "rational and non-

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[5] See Competitive Telecommunications Ass'n v FCC, 87 F.3d 522, 529 (D.C. Cir. 1996) (citations omitted) ("CompTel v. FCC").

conclusory analysis in support of its determination that an alternative structure is preferable."[6] The Commission has met that standard in this proceeding.

1. NYNEX Has Had More Than An Adequate Opportunity To Identify And Recover The Costs Recovered In Its TIC.

Throughout the Petition for Stay, NYNEX asserts that it must be permitted to recover its non-service related TIC revenues. NYNEX portrays itself as a victim of a change in the regulatory landscape that it was powerless to avoid. Nothing could be further from the truth. Before establishing Section 69.155(c), the Commission had given NYNEX every opportunity to identify the costs it recovers in the TIC. Moreover, NYNEX has known for over a decade that the Commission intended to transition to cost-based access charges in which ILECs could not possibly expect to recover non-service related costs from their competitors. There is no reason now to stay an important part of the long-awaited transition to cost-based transport because NYNEX or any other ILEC has failed to adapt to this slowly changing environment.

The Commission has recognized the need for a rational, cost-based access charge regime since it first established rules on the subject in 1983.[7] The Modification of Final Judgment superseded the Commission's 1983 Order, however, and required that all exchange access (including switched transport) be

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[6] See id. at 536.

[7] See MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241 (1983).

subject to the same per minute charge until 1991.[8] This so-called "equal charge" rule was designed to give ILECs time to develop adequate tandem-switched facilities to accommodate long distance carriers other than AT&T (which generally used dedicated transport).

In anticipation of the expiration (and during a temporary extension) of the equal charge rule, the Commission conducted its Transport Rate Structure proceeding in order to apply the rational principle announced in 1983 to switched transport.[9] Rather than adopt a truly cost-based rate structure, however, the Commission established in that proceeding an interim rate structure consisting of flat entrance facility and direct-trunked transport charges, a usage-based tandem-switched transport charge, and the residual interconnection charge ("RIC") or TIC as it is currently called. The TIC was levied on all switched transport traffic and was in part designed as a means of subsidizing tandem-switched transport with revenues from direct-trunked transport.

But the Commission recognized that the TIC recovered much more than tandem switching costs. In fact, there was evidence before the Commission that the TIC would recover (1) costs of network upgrades and of facilities rendered obsolete by the new

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8 See United States v. AT&T, 552 F. Supp. 131, 233, Appendix B, ¶ B(1) (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

9 See Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7009-7010 (1992) ("First Transport Order").

access charge requirements;[10] (2) the cost of services other than tandem switching,[11] although only SS7 service was specifically identified at the time;[12] (3) overallocations to the interstate jurisdiction;[13] and (4) costs that had not been identified.[14]

Moreover, in establishing the TIC, the Commission acknowledged that it was only appropriate as a two year interim measure (beginning in 1993), and it reiterated its original conclusion that only a cost-based rate structure would be appropriate in the long-term.[15] The Commission therefore stated that "there is a compelling need to determine exactly what costs are in the [TIC], and what regulatory treatment should be

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10 See id. at 7046 ("The [TIC] will also include LEC costs for facilities currently in place that may not be needed for transport once a new rate structure is implemented, as well as costs associated with copper plant that has been or will be replaced with less expensive fiber facilities") id. at 7065 ("As LECs deploy more fiber in their network, the useful life of older technologies, such as copper, is reduced in areas where fiber deployment is warranted by service demand. These older facilities, however, may not be fully depreciated, and therefore the underdepreciated portion of this investment will be recovered through the [TIC].")

11 See id. at 7046 (the TIC "may include costs more appropriately recovered through other access elements").

12 See id. at 7019

13 See id. at 7063-7064.

14 See id. at 7063.

15 See id. at 7016. In fact, the Commission later stated in the Third Order on Reconsideration in the Transport proceeding that its interim rate structure was instituted to allow long distance carriers "time to prepare for a fully cost-based rate structure." See Transport Rate Structure and Pricing, Third Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 3030, 3048 (1994).

accorded these costs" and solicited comments on this issue.[16] Any costs that ultimately may remain in the TIC should, the Commission stated, include only those costs "relating to clearly identified public policy goals."[17]

Finally, lest there be any question on the issue, the D.C. Circuit last year held that the Commission's "interim" transport rate structure was unlawful. As mentioned, the Court held that the Commission must either adopt a cost-based transport rate structure or provide a reasonable explanation as to why it has not done so. The D.C. Circuit strongly implied in its decision that the Commission must come to some decision as to the costs associated with transport elements.[18] Thus, although the Court recognized that the TIC may have been reasonable as an initial matter, it held that "[t]he interim period has long since expired with no discernible progress by the FCC toward the determination of actual tandem switch cost."

After its repeated promises to adopt a cost-based transport rate structure over the past 15 years and a Circuit Court rejection of the "interim" plan, the Commission has only now, in the Access Reform Order, taken steps to implement such a regime. It is hard to imagine a situation in which NYNEX could have been on clearer notice that it would be required to transition to a

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16 See Transport Rate Structure and Pricing, Further Notice of Proposed Rulemaking, 7 FCC Rcd at 7063.

17 See id.

18 See CompTel v. FCC, 87 F.3d at 532.

cost-based rate structure. Moreover, NYNEX has had ample opportunity to demonstrate to the Commission the nature of the non-service related costs that will be part of its per minute residual TIC. Despite this notice, NYNEX has failed to prepare for a cost-based regime as well as the other ILECs have. It is eminently reasonable for the Commission to require that NYNEX face the consequences of this failure.

2. The Per-Minute Residual TIC Rule Is Consistent With The Commission's Approach To Access Reform.

NYNEX offers two reasons for its assertion that the Commission acted arbitrarily and capriciously when it adopted Section 69.155(c). NYNEX first argues that this rule contradicts the logic of the Commission's observation that "if the incumbent LEC's transport rates are kept artificially low and the difference is recovered through the TIC, competitors of the incumbent LEC pay some of the incumbent LEC's transport costs."[19] Under the logic of this statement, NYNEX contends that ILECs should be permitted to at least recover TIC revenues that are not associated with transport service (non-service revenues) even where CAPs provide switched transport. This argument is unpersuasive.

The Commission's conclusion that the TIC should not be imposed where the CAP is required to pay for part of its competitor's costs is completely rational. Under the Commission's rules, the ILECs' residual TICs could include tandem

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[19] See Access Charge Order at ¶ 240.

switching revenue as late as January 1, 2000. Until that time, ILEC tandem-switched transport will be kept artificially low and long distance carriers using CAP service would be required to pay for part of the shortfall if the TIC applied where the CAP provides transport. As the Commission found, requiring a carrier to subsidize its competitor's service is inconsistent with the pro-competitive goals of the 1996 Act because it discourages competitive entry. In such a situation, the CAP must contend with artificially low rates and must effectively increase its own rates to cover the cost of those artificially low rates.

NYNEX implies that, while this may be true, there is no reason why the non-service related costs should not be recovered from CAP customers. NYNEX essentially asks for permission to bulk bill its non-service related costs to other carriers. But the Commission explicitly rejected such arrangements because they "insulate TIC costs from the pressures of the competitive market and guarantee incumbent LECs the recovery of these amounts, even where such costs have resulted from inefficiencies that the competitive market -- but not regulators -- detected and otherwise would eliminate."[20] Indeed, the fundamental rationale behind the Commission's choice of a market-based approach to lowering access charge levels is that efficient entry will drive access prices toward the costs of the most efficient provider. This is not going to happen if ILECs can recover the residual TIC from CAP switched transport customers.

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[20] See id. at ¶ 241.

NYNEX's second argument in support of its challenge to Section 69.155(c) is that the rule is inconsistent with the Commission's decision to permit recovery of residual TIC revenues through the primary interexchange carrier ("PIC") charges. NYNEX believes that, since PIC charges apply even where a CAP provides transport service, the per minute residual TIC should also apply in these instances. But even assuming arguendo that the recovery of residual TIC revenues through PIC charges could be seen as inconsistent with the Commission's approach to the per-minute residual TIC, it does not follow that the Commission should allow recovery of the latter where CAPs provide transport. Rather, the Commission should amend its rules in its own sua sponte reconsideration order[21] to prohibit recovery of the residual TIC revenues through PIC charges where a CAP provides transport service. Such an approach would be consistent with the Commission's decision on the recovery of the per-minute TIC and would comport with the overall market-based approach adopted by the Commission.

3. Section 69.155(c) Will Not Have An Impermissibly Disparate Effect on NYNEX.

NYNEX makes several arguments in support of its claim that the Commission's residual TIC rules have an arbitrarily deleterious effect on the Company. In these arguments, NYNEX essentially asserts that it deserves special treatment either because it has many more non-service related TIC revenues to

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[21] See 47 C.F.R. § 1.108.

recover or because there is more competitive entry in the NYNEX region than elsewhere. None of these arguments places in doubt the legality of the Commission's decision.

First, NYNEX argues that the PIC charge recovery scheme essentially permits some carriers, but not NYNEX, to recover all of their residual TIC revenues even where a CAP provides transport service. As explained above, the proper remedy for any difference in treatment is to prohibit ILECs from recovering the residual TIC revenues through PIC charges where a CAP provides transport service.

Second, NYNEX asserts that the price cap rules require that the per-minute residual TIC be set based on the 1996 demand for ILEC Local Transport which will not account for lower demand caused by competition. The purported result is a TIC charge that is <u>too low</u>. This is a strange argument in light of NYNEX's broader assertion (discussed below) that, given the large size of its TIC, long distance carriers will have a strong incentive to switch to CAP dedicated transport to avoid the charge. One would think NYNEX would welcome a lower TIC to diminish this incentive. But the truth is that NYNEX wants it (and for a long time has had it) both ways: it thinks its competitors should continue to pay for the ILECs' inefficiencies (since inefficiency is the only way to account for its uniquely huge non-service related costs). But this is exactly the regime the D.C. Circuit rejected in the CompTel decision.

Indeed, the argument that NYNEX's TIC will be too low is simply a restatement of NYNEX's general plea that it be permitted

to recover its non-service related costs. This is because, as NYNEX recognizes, the argument is only relevant to the non-service related costs that the Company will continue to incur when CAP transport it used.[22] But there is no reason why NYNEX should be guaranteed the recovery of these costs.

Third, NYNEX argues that the Commission's rules prevent ILECs from recovering the cost of tandem switching during the transition to a cost-based tandem switching rate. NYNEX asserts that it will continue to incur the full cost of the use of tandem-switching during that time, but that the CAP exemption on the residual TIC will reduce the temporary subsidy flow from dedicated transport users necessary to cover NYNEX's tandem switching costs. This argument is easily addressed.

The solution to this possible issue is simply to permit ILECs (again through reconsideration), upon individual requests, to make a faster transition to fully cost-based tandem switching charges. The long distance carriers that use this switching have had a great deal of time to adjust to this development, and there is no reason why it should not be expedited in particular cases.

Finally, as mentioned, in various parts of its Petition for Stay, NYNEX argues that its high non-service related TIC costs will give long distance carriers an extra incentive to switch to CAP transport in the NYNEX region if Section 69.155(c) goes into effect. But loss of market share is simply part of competition.

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[22] See Petition for Stay at 15. In other words, NYNEX would not continue to incur service-related transport costs when a CAP provides this service instead.

NYNEX does not have a right to continue to control the transport service market. If NYNEX wishes to compete in this environment, it has every right to become more efficient and charge a lower TIC. After all, as the D.C. Circuit observed in CompTel v. FCC, the goal of regulation is the promotion of competition, not the protection particular competitors.[23]

B. The Commission Adopted Section 69.155(c) After Providing Adequate Notice To Interested Parties.

NYNEX asserts that the Commission failed to meet the Administrative Procedure Act's ("APA") notice and comment requirement in promulgating the per-minute residual TIC rule.[24] In particular, NYNEX states that paragraph 97 of the NPRM, which the Commission cited as having raised the subject of applying the TIC to CAP transport, failed to "put the LECs on notice that the Commission would adopt a rule that would retain a portion of the TIC, but prevent the LECs from applying the TIC to CAP transport."[25] NYNEX added that this issue was first addressed in an ex parte filing; the Commission did not ask the industry for relevant data; and the record did not quantify the impact of the rule on LECs.[26] Contrary to NYNEX's claim, however, the Commission met its APA notice obligation.

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23 See CompTel v. FCC, 87 F.3d at 530.

24 Petition for Stay at 18 (citing 5 U.S.C. § 553(b)).

25 Id.

26 Id. at 19.

Under the APA, an agency's "description of the subjects and issues" involved in a proceeding provides adequate notice in a rulemaking.[27] The agency "must provide sufficient factual detail" and explain the proposed rule's rationale to "permit interested parties to comment meaningfully."[28] A difference between the proposed and final rules will not invalidate the final rule, provided the latter was a "logical outgrowth" of the former.[29] The Court of Appeals for the D.C. Circuit applies the "logical outgrowth" test functionally, asking whether the "purposes of notice and comment have been adequately served."[30] An agency may meet the "logical outgrowth" test simply by announcing in its public notice that a subject matter is "at issue."[31]

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27 5 U.S.C. § 553(b)(3). The agency may either notify parties of the terms or substance of the proposed rule or provide a description of the subjects and issues involved. Id. It also must provide a statement of the time, place, and nature of the public rule making proceeding and a reference to the legal authority under which the rule is proposed. 5 U.S.C. 553(a),(b).

28 National Electric Manufacturers Assn. v. EPA, 99 F.3d 1170, 1172 (D.C. Cir. 1996) quoting Florida Power and Light Co. v. US, 846 F.2d 765, 771 (D.C. Cir. 1988), cert. den. 490 U.S. 1045 (1989).

29 Shell Oil Co. v. EPA, 950 F.2d 741, 747 (D.C. Cir. 1991).

30 American Water Works Assn. v. EPA, 40 F.3d 1266, 1274 (D.C. Cir. 1994). These purposes include (1) public participation and fairness in rulemaking, and (2) informed agency decision-making. MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1141 (D.C. Cir. 1995).

31 See Engine Manufacturers Assn. v. EPA, 88 F.3d 1075, 1083 (D.C. Cir. 1996) (Court rejected petition to vacate rule for failure to give adequate notice of final rule's preemption of state standards, reasoning that agency announced in its notice that preemption was at issue).

The Commission has met the "logical outgrowth" test by notifying parties of its intent to address a policy goal and implying the methods by which it might achieve that goal.[32] In Aeronautical Radio, petitioners claimed that the Commission failed to provide sufficient notice that it might require individuals collectively applying for a mobile satellite service ("MSS") license to contribute funds to the consortium-applicant in order to demonstrate the consortium's financial eligibility.[33] The Court, however, found that the Commission met the "logical outgrowth" test.[34] It reasoned that, because the NPRM apprised interested applicants that they would have to make a financial showing and articulated its goal of fostering a "multi-ownership approach," petitioners "reasonably should have anticipated that the Commission might" require multiple owners to contribute funds.[35]

Just as the Commission in Aeronautical Radio apprised interested applicants that they would have to make a financial showing, the Commission in this instance apprised interested parties that the TIC structure posed anti-competitive problems because ILECs' competitors paid a share of incumbent LEC

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32 See Aeronautical Radio Inc. v. FCC, 928 F.2d 428, 445-446 (D.C. Cir. 1991).

33 Id. at 445.

34 Id. at 446.

35 Id.

transport costs.[36] The Commission also expressly stated that the TIC, in its current form, "will be unsustainable."[37] Moreover, just as the Commission in Aeronautical Radio articulated a goal of promoting multiple owners of MSS systems, the Commission here articulated a goal of establishing "a mechanism to phase out the TIC in a manner that fosters competition. . . ."[38]

Applying the Aeronautical Radio Court's reasoning to the per-minute residual TIC rule, parties reasonably should have known that the Commission might have prohibited LECs from applying the TIC to CAP transport. Just as the Court concluded in Aeronautical Radio that the Commission's "expressed interest" in a multi-ownership approach meant petitioners reasonably might have concluded that the Commission would act as it did,[39] the Court would conclude here that the Commission expressly identified the anti-competitive problems inherent in subsidizing ILEC transport costs through CAPs' TIC payments and established its goal of fostering competition.[40] Thus, the Commission's

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36 See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing, CC Docket Nos. 96-262, 94-1, 91-213, Notice of Proposed Rulemaking at ¶ 97 (released December 24, 1996).

37 Id. at ¶ 112.

38 Id. at ¶ 98.

39 Aeronautical Radio, 928 F.2d at 446.

40 TWComm filed comments expressly addressing the issue of preventing ILECs from assessing a TIC on CAP transport, further suggesting that the Commission provided adequate notice of this issue. See, e.g., TWComm Comments at 14-15 ("[i]f the Commission decides to retain the TIC for a period of time to recover costs not directly attributable to

final rule was a "logical outgrowth" of its proposed approach described in the NPRM, thereby meeting the APA's notice requirements.

The Commission has therefore met the "logical outgrowth" test under section 553(b)(3) of the APA, providing sufficient notice that it might prohibit LECs from applying the TIC to CAP transport. NYNEX's assertions that the issue was first raised in an ex parte filing and that the Commission failed to consider the impact of the rule on LECs are immaterial in the context of adequate notice. So long as the Commission alerted parties to the possibility that it might prevent LECs from assessing the TIC on CAPs, which it did here, and the final rule was a "logical outgrowth" of the issues raised in the NPRM, which it was, the Commission has met its notice requirement under the APA.

III. NYNEX WILL NOT SUFFER IRREPARABLE HARM IF SECTION 69.155(c) IS ALLOWED TO GO INTO EFFECT.

NYNEX asserts that Section 69.155(c) will cause the Company to lose revenues and access customers. However, neither of these constitutes irreparable harm because both can be addressed through the use of conventional judicial remedies. On this basis alone, the Commission should deny the Petition for Stay.

As the D.C. Circuit has long held, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation,

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transport rate elements, such a charge should not be imposed where a CAP provides transport service").

weighs heavily against a claim of irreparable harm."[41] In the case of NYNEX's claims regarding lost revenues and customers, adequate compensatory and corrective relief could easily be awarded.

For example, to the extent that NYNEX claims that the application of Section 69.155(c) will cause it to suffer lost revenues, a reviewing Court could order the Commission on remand to reestablish the TIC (perhaps at a higher level and to be applied on all switched traffic) or increased PIC charges in a manner that makes NYNEX whole.

Adequate relief could also be ordered to address any loss of customers NYNEX suffers as a result of the provision in question.[42] For example, the Court could order the Commission on remand to ensure that NYNEX recovers its non-service related TIC revenues in a manner that does not effect its competitive position in the switched transport market. In this way, NYNEX would be made whole through the use of normal judicial remedies without any need for a stay.

IV. A STAY WOULD SUBSTANTIALLY HARM TWCOMM AND OTHERS SIMILARLY SITUATED.

With little analysis, NYNEX blithely dismisses any possibility that a stay could harm other parties. In truth,

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41 See Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

42 See Central & Southern Motor Freight Tariff Assn., Inc. et al. v U.S., 757 F.2d 301, 309 (D.C. Cir. 1985) (in lifting a stay on Interstate Commerce Commission decisions, the Court reasoned that "revenues and customers lost to competition which can be regained through competition are not irreparable [harm]").

however, a stay would substantially harm new entrants like TWComm that are attempting to establish themselves in the access market. Competition for the provision of tandem-switched transport is almost impossible if CLEC transport customers must continue to pay the TIC. This is because, until the completion of the transition to cost-based tandem switching, CLECs would be forced to compete against subsidized ILEC prices and would be effectively forced to pay for part of that subsidy. Thus, even where TWComm is the more efficient provider of tandem-switched transport service, it will be prevented from competing for the provision of this service if Section 69.155(c) is stayed.

Furthermore, continued application of the TIC to CAP transport customers would also likely reduce CAP opportunities in the sale of direct-trunked transport. Were Section 69.155(c) to go into effect, long distance carriers would be able to take advantage of lower CAP cost curves in the provision of dedicated transport because they would not have to pay the TIC in addition to the CAP rates. If these lower costs for long distance carriers are passed through to customers as lower prices, usage will increase (in the case of direct-trunked transport this would mean that customers would order more trunks) causing CAP profits to increase.

That CLECs would thus lose the opportunity to grow makes the harm they suffer no less real than the harm of lost revenues and customers predicted by NYNEX. Competitive entry into the access business is extremely costly and investors demand a return on their capital. The artificial barriers to entry created by the

application of the TIC to CAP transport customers is a very serious issue for the growth of these companies. A stay of Section 69.155(c) would therefore substantially harm the CAPs.

V. A STAY IS NOT IN THE PUBLIC INTEREST.

A stay would also be extremely harmful to the public interest. The elimination of the TIC for CAP switched transport customers will remove an important entry barrier for competitive access. As a result of Section 69.155(c), long distance carriers will be able to purchase less expensive switched transport (both dedicated and tandem-switched) when they are served by CAPs. Lower costs and a more rational rate structure for long distance carriers (many of which have no alternatives available at this time) will likely translate into lower long distance prices and increases in the quantity of long distance services demanded.

In addition, increased transport competition will help drive out subsidies that are embedded in the ILECs' transport rate elements. When forced to compete with CAPs that do not have to pay for their competitors' inefficiencies, the ILECs will be forced to act more efficiently. Even ILEC access customers will therefore benefit from the application of Section 69.155(c) through lower rates.

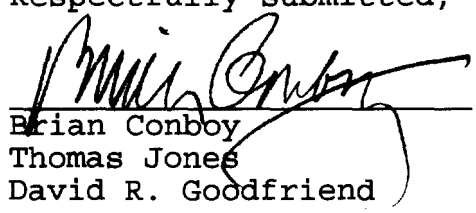
Thus, a stay of Section 69.155(c) will deny carriers and their consumers the significant benefits of increased competition and a more rational rate structure. The D.C. Court of Appeals and the Commission itself have recently found that these objectives serve the public interest. NYNEX has offered no reason why those judgments were incorrect.

Finally, a stay would also needlessly add uncertainty to the regulatory environment for competitive entry. Especially in light the Eighth Circuit's recent decision overturning many of the Commission's interconnection rules, further delay and uncertainty would disserve the public interest benefits of competition so clearly endorsed by Congress when it passed the 1996 Act.

VI. CONCLUSION

For the reasons explained above, the Commission should deny the instant Petition for Stay of the Access Charge Order.

Respectfully submitted,



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ATTORNEYS FOR TIME WARNER COMMUNICATIONS HOLDINGS INC.

August 8, 1997

CERTIFICATE OF SERVICE

I, Catherine M. DeAngelis, do hereby certify that on this 8th day of August, 1997, copies of the foregoing "Opposition of Time Warner Communications Holdings Inc." were mailed, first class postage prepaid, unless otherwise indicated, to the following parties:

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